Kerajaan Negeri Melaka v Ariffin & Associates

HIGH COURT (MELAKA) — ORIGINATING MOTION NO MT1–25–9 OF 2005
LOW HOP BING J
27 MARCH 2007

Contract — Terms — Implied Terms — Whether arbitrator had correctly implied a term into the agreement — Whether there was a misconstruction

The State Government of Melaka ('the applicant') appointed the consulting architect for the construction of two stadiums. On 6 October 1994, the State Government and the architect entered into a formal memorandum of agreement with the conditions of engagement and the schedule of fees. At the outset, the firm was informed, repeatedly, that the budget was RM85m. In January 1994, the architect prepared preliminary cost estimates and they exceeded RM85m. Subsequently, another cost estimate was prepared and it increased but was later reduced on the State Government's instructions. At a meeting on 6 May 1994, the State Government reiterated that the budget was still to be RM85m, but due to the circumstances, it was raised to RM100m. This sum was reiterated again on 2 October 1995. At a meeting on 14 October 1995, the Public Works Department ('PWD') confirmed the amount and an additional RM30m was added for infrastructure, etc. On 19 December 1995, the consultant architect prepared cost estimate No 4 for RM225,719,940.75 as this was disputed before the arbitrator. Cost estimate No 5 was requested by the State Government but was not done. Vide a letter dated 25 April 1996, to the State Financial Officer, the director of PWD stated that based on cost estimate No. 3, RM3,396,592.54 was payable to the consulting architect. The State Government has paid a total of RM3,153,928.82 to the architect. It was not disputed that the architect's service had been terminated and the architect commenced proceedings against the State Government. The arbitrator made an award in favour of the architect awarding additional sums for cost estimate No 4, town planning services, reimbursable expenses, arbitration costs and interest. The State Government applied for an order to set aside such, stating that the arbitrator had inferred an implied term into the contract and misconstrued certain clauses.

Held, setting aside the award of RM1,713,768.73 for professional fees based on cost estimate No. 4 and substituting it, and setting aside the award for professional fees for town planning services, the award for reimbursable expenses and arbitration costs:

(1) Clause 11 sets out the types of services and payment and cl 1(c) provides for the method of arriving at the 'cost of works'. The arbitrator focused on the construction of cl 1(c) without any reference to cl 11(2) and appeared to have construed cl 1(c) by implying a term into the contract i.e. the acceptance by

the Government was not to be unreasonably withheld if there was no impropriety on the part of the consulting architect, and there was the State Government's acceptance by default. The professional fees which the consulting architect may claim were expressly stated in cl 11(2) and cl 1(c) i.e. the estimate cost must not only have been agreed to by the State Government under cl 11(2), but also accepted by the State Government under cl 1(c). There could be no room or necessity for the arbitrator to infer an implied term into the contract. The arbitrator had misconstrued cl 1(c) (see paras 29, 30, 31, 35). *Datin Peggy Taylor v Udachin Development Sdn Bhd* [1984] 1 MLJ 85 distinguished.

(2) The terms of reference which the architect relied on exclusively had to be construed conjunctively with the relevant clauses in the conditions of engagement and the schedule of fees. The clear and unambiguous provisions of cl 5(5) must not have been disregarded. In discharging the responsibility under the terms of reference, it was incumbent on the architect to obtain the written consent of the State Government as a sine qua non. The fees had to be agreed by both the parties pursuant to cl 8 and cl 13, read with cl 7(e). In the absence of any written consent obtained from the State Government, the State Government's liability to pay would not have arisen under cl 8 and cl 13. By having referred to the terms of reference without taking into consideration the clear and unambiguous terms of cl 5(5), cl 8 and cl 13, the arbitrator had omitted to construe these essential clauses (see para 40).

(3) The consulting architect was entitled to be reimbursed for expenses stated in paras (a) to (e) of cl 10 and these ought to have been itemised and supported by some documents such as bills, payment vouchers, etc that the expenses could be verified and the claim allowed. The court was unable to find the necessary particulars for the purpose of verifying the reimbursable expenses. There was a misconstruction of cl 10 (see paras 45, 46).

(4) The arbitrator taxed the costs but he had not set out the procedure or method which he had adopted in order to arrive at the said amount. The parties were not given the chance to be heard or make submissions before the arbitrator awarded the taxed costs. Clause 4 of the contract for the settlement of disputes between the parties by way of arbitration did not express any intention in relation to costs. Hence, under s 19(1), the arbitrator had full discretion in the matter of costs, but the arbitrator had not embarked upon a proper exercise of judicial discretion under s 19(1) and in the absence of a proper exercise of discretion, the taxed costs that were awarded was legally unsustainable (see paras 50, 52, 54).

[Bahasa Malaysia summary

Kerajaan Negeri Melaka (pemohon) telah dilantik sebagai jurubina perunding bagi pembinaan dua buah stadium. Pada 6 Oktober 1994, Kerajaan Negeri dan jurubina telah memasuki perjanjian memorandum secara rasmi berkenaan dengan syarat pengambilan dan jadual pembayaran. Pada permulaannya, firma tersebut dimaklumkan, berulang kali, bahawa peruntukkannya adalah sebanyak RM85j. Pada bulan Januari 1994, jurubina telah menyediakan kos anggaran permulaan dan

ia melebihi 85j. Kemudiannya, kos anggaran lain disediakan dan ia bertambah tetapi telah dikurangkan atas arahan Kerajaan Negeri. Semasa mesyuarat pada 6 Mei 1994, Kerajaan Negeri mengulangi bahawa peruntukkan masih pada takat 85j, tetapi disebabkan oleh keadaan-keadaan, ia telah dinaikkan kepada RM100j. Jumlah tersebut diulang pada 2 Oktober 1995. Semasa mesyuarat pada 14 Oktober 1995, Jabatan Kerja Raya (JKR) mengesahkan jumlah tersebut dan tambahan sebanyak RM30j telah ditambah untuk infrastruktur, dll. Pada 19 Disember 1995, jurubina perunding telah menyediakan kos anggaran keempat untuk sejumlah RM225,719,940.75 dan telah dipertikaikan di hadapan penimbangtara. Kos anggaran kelima telah diminta oleh Kerajaan Negeri tetapi tidak pernah diendahkan. Melalui surat bertarikh 25 April 1996, Pegawai Kewangan Negeri, pengarah JKR menjelaskan bahawa kos anggaran ketiga, iaitu RM3,396,592.54 telah dibayar kepada jurubina perunding. Kerajaan Negeri telah membayar sejumlah RM3,153,928.82 kepada jurubina. Tidak pernah dipertikaikan tentang perkhidmatan jurubina yang telah ditamatkan dan jurubina telah memulakan prosiding terhadap Kerajaan Negeri. Penimbangtara telah memberikan award dipihak jurubina untuk jumlah tambahan bagi kos anggaran keempat, perkhidmatan perancangan bandar, jumlah perbelanjaan yang perlu diganti, kos timbang tara dan faedah. Kerajaan Negeri telah memohon untuk mengenepikan perintah tersebut, sambil menyatakan bahawa penimbang tara menyimpulkan dan memasukkan terma-terma tersirat ke dalam kontrak dan telah tersalahtafsir klausa-klausa tertentu.

Diputuskan, mengenepikan award berjumlah RM1,713,768.73 untuk yuran professional ke atas anggaran kos keempat dan menggantikannya, dan mengenepikan award professional untuk perkhidmatan perancangan Bandar, award untuk jumlah perbelanjaan yang perlu diganti dan kos timbang tara.

(1) Klausa 11 menetapkan jenis-jenis perkhidmatan dan bayaran dan kl 1(c) memperuntukkan kaedah yang membawa kepada "kos kerja-kerja tersebut". Penimbangtara lebih memperincikan ke atas penafsiran kl 11(2) dan nampaknya telah menafsirkan kl 1(c) dengan melibatkan terma ke dalam kontrak iaitu penerimaan Kerajaan tidak boleh ditahan tanpa pertimbangan wajar jika tidak terdapat kesalahan pada pihak jurubina perunding, dan Kerajaan Negeri telah menerimanya dengan keingkaran. Yuran professional yang dituntut oleh jurubina perunding telah dinyatakan secara jelas dalam kl 11(2) dan kl 1(c) iaitu kos anggaran tidak hanya perlu dipersetujui oleh Kerajaan Negeri di bawah kl 11(2), tetapi hendaklah diterima oleh Kerajaan Negeri di bawah kl 1(c). Tiada keperluan bagi penimbangtara untuk membuat kesimpulan terma tersirat kedalam kontrak. Penimbangtara telah menyalahtafsirkan kl 1(c) (lihat perenggan 29, 30,31,35). *Datin Peggy Taylor v Udachin Development Sdn Bhd* [1984] 1 MLJ 85 dibezakan.

(2) Terma-terma rujukan yang telah digunapakai secara ekslusif oleh jurubina hendaklah ditafsirkan secara berhubung dengan klausa-klausa relevan dalam syarat-syarat pengambilan dan jadual pembayaran. Peruntukkan kl 5(5) yang jelas dan terang hendaklah tidak dikecualikan. Dalam melaksanakan tanggungjawab dibawah terma-terma rujukan, menjadi kewajipan kepada jurubina untuk mendapatkan kebenaran bertulis dari Kerjaan Negeri sebagai sine qua non Yuran-yuran hendaklah dipersetujui berdasarkan kepada

peruntukkan kl 18 dan kl 13 dibaca bersama dengan k l7(e). Dalan ketiadaan sebarang kebenaran bertulis daripada Kerajaan Negeri, tanggungjawab Kerajaan Negeri untuk membayar tidak akan timbul di bawah kl 18 dan kl 13. Dengan merujuk kepada terma-terma rujukan tanpa mempertimbangkan terma-terma kl 5(5), kl 8 dan kl 13 yang jelas dan terang, penimbangtara telah gagal untuk menafsirkan klausa-klausa yang penting (lihat perenngan 40).

(3) Jurubina perunding berhak terhadap pengembalian semula perbelanjaan-perbelanjaan yang dinyatakan dalam perenggan (a) sehingga (e) kl 10 dan ia hendaklah diperincikan dan disokong oleh dokumen-dokumen seperti bil-bil, baucar pembayaran, dll bahawa perbelanjaan-perbelanjaan boleh ditentusahkan dan tuntutan boleh dibenarkan. Mahkamah tidak dapat mencari butir-butir yang sesuai bertujuan menentusahkan perbelanjaan-perbelanjaan yang perlu dikembalikan. Terdapat salah tafsiran bagi kl 10 (lihat perenggan 45, 46).

(4) Penimbangtara telah menaksirkan kos tetapi tidak menyenaraikan prosedur ataupun kaedah yang telah digunapakai sehingga berjaya sampai ke jumlah itu. Pihak-pihak tidak diberikan peluang untuk pendengaran atau membuat hujahan sebelum penimbangtara memberikan kos taksiran. Klausa 4 kontrak tersebut bagi penyelesaian pertikaian-pertikaian antara pihak-pihak melalui timbangtara tidak menyebut dengan jelas berkenaan dengan kos. Di sini, di bawah s 19(1), penimbangtara mempunyai budibicara penuh dalam perkara berkaitan kos tetapi penimbangtara tidak memulakan penggunaan sesuai ke atas budibicara kehakiman di bawah s 19(1) dan kerana ketiadaan penggunaan sesuai ke atas budibicara, kos yang ditaksirkan yang diawardkan adalah secara perundangannya tidak dapat dikekalkan (lihat perengga 50, 52, 54).]

Notes

For cases on implied terms, see 3(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 4691–4735.

Cases referred to

BP Refinery (Westernport) Pty Ltd v Hastings Shire Council [1977] 16 ALR 363 (refd)
Datin Peggy Taylor v Udachin Development Sdn Bhd (dist) [1984] 1 MLJ 85 (dist)
Intelek Timur Sdn Bhd v Future Heritage Sdn Bhd [2004] 1 MLJ 401 (refd)
Luxor (Eatborne) v Cooper [1941] AC 108 (refd)
Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd [1997] AC 749 (efd)
Reigate v Union Manufacturing Co (Ramsbottom) Ltd ; [1918] 1 KB 592 (refd)
Sababumi (Sandakan) Sdn Bhd v Datuk Yap Pak Leong [1998] 3 MLJ 151 (refd)
Shirlaw v Southern Foundries [1928] Ltd ([1939] 2 KB 206 (refd)
Teong Piling Co v Asia Insurance Co Ltd [1994] 1 MLJ 444 (refd)
Yap Nyo Nyok v Bath Pharmacy Sdn Bhd [1993] 2 MLJ 250 (refd)

Legislation referred to

Arbitration Act 1952 s 19(1), 24(2)
Evidence Act 1950 s 92(e)
Sale of Goods Act 1957

DP Naban (Lee Hishammuddin Allen & Gledhill) for the applicant.
William JK Leong (Evelina Appaduray with him) (William Leong & Co) for the respondent.

Low Hop Bing J:

APPLICATION

[1] This is the originating motion filed by the applicant, the State Government of Melaka ('the State Government') for an order inter alia that the arbitrator's award dated 5 July 2005 be set aside, with costs to be paid by the respondent ('the consulting architect').

FACTUAL BACKGROUND

[2] Vide letter dated 24 January 1994, the State Government appointed the consulting architect for the construction of Stadium Terbuka and Stadium Hoki at Ayer Keroh Melaka (collectively, 'the project').

[3] On 6 October 1994, the State Government and the consulting architect entered into a formal memorandum of agreement together with the conditions of engagement and the schedule of fees, which collectively constitutes the contract.

[4] For the project in the contract, the consulting architect was to provide basic architectural services such as schematic design, design development, contract documentation, contract administration and supervision (collectively 'the basic services'). Apart from the basic services, the State Government could require the consulting architect to carry out special services as defined in the schedule of fees.

[5] At the outset of the project, the firm was informed, with repeated subsequent reminders at meetings which were documented in the respective minutes, that the budget allocated for the project was RM85m and the consulting architect must ensure that it would not be exceeded.

[6] In or around April 2004, preliminary cost estimate No. 3 was prepared for the project at the estimated total development costs of RM213,401,200.

[7] On the State Government's instruction to reduce the costs involved, the consulting architect submitted cost reduction exercise No. 1, reducing the costs to RM90,288,000. Pursuant to cost reduction exercise No. 2, the costs had been reduced to RM84,372,800.

[8] At the consultants' meeting No. 4 held on 6 May 1994, the State Government reiterated that the budget for the entire project, including the professional fees was RM85m.

[9] In the light of increasing costs and the requirements of the project, the State Government decided to increase the budget to RM100m. This was communicated to inter alia the consulting architect at the coordination meeting No. 3/95 held on 22 May 1995. The budget of RM100m was reiterated at the coordination meeting No 4/95 held on 2 October 1995.

[10] At the consultants' coordination meeting held on 14 October 1995, the Public Works Department (PWD) confirmed that the budget of RM100m was in respect of stadiums and an additional RM30m had been allocated for infrastructure, ancilliary buildings and fees, thus making an aggregate budget of RM130m for the project.

[11] In or around December 1995, the consulting architect prepared cost estimate No. 4 for the total development costs of RM225,719,940.75 which was disputed before the arbitrator.

[12] Vide letter dated 9 December 1995, the State Government instructed quantity surveyors (Messrs Zainal & Rakan-Rakan) to prepare a detailed cost estimate No. 5 but it was not done.

[13] Vide letter dated 25 April 1996 to the State Financial Officer, the director of PWD stated that based on cost estimate No. 3, a total professional fee of RM3,396,592.54 was payable to the consulting architect, and for this purpose, facsimile dated 15 May 1996 was sent to the consulting architect.

[14] In or around May 1996, the State Government made a payment of RM962,249.97 to the consulting architect. To date, the State Government has made a total payment of RM3,153,928.82 to the consulting architect.

[15] The consulting architect did not dispute that their services had been terminated.

[16] Subsequently, pursuant to arbitration proceedings commenced by the consulting architect against the State Government, an award was made on 5 July 2005 in favour of the consulting architect in the following terms:

(1) an additional sum of RM 1,713,768.73 as professional fees based on cost estimate No. 4;

(2) a sum of RM 141,750 as professional fees for town planning services;

(3) a sum of RM16,061.70 as reimbursable expenses;

(4) a sum of RM 118,794.66 as arbitration costs; and

(5) interest at 8% per annum on items (1) and (2) above.

IMPLIED TERM

[17] As respective learned counsel for the parties herein had submitted at great length on the law governing the admission of an implied term into a contract, it is

necessary for me to say that the law has been comprehensively dealt with by the Federal Court in *Sababumi (Sandakan) Sdn Bhd v Datuk Yap Pak Leong* [1998] 3 MLJ 151. The relevant facts reveal that the High Court had implied a term into the agreement made in 1995 between the parties therein viz the operator of the one part, and the turf club of the other part and declared that the gaming licence issued in 1995 was within the scope thereof. The implied term was that so long as the turf club was allowed or licensed under the law to conduct off-course and on-course betting, the operator could continue to have the exclusive right to conduct and manage such off-course and on-course betting for the periods as provided in the agreement. The Court of Appeal reversed the High Court decision on this point. On further appeal, the Federal Court, in three separate but unaminous judgments disagreed with the Court of Appeal and affirmed the High Court decision. The judgment of Peh Swee Chin FCJ (as he then was) at pp 531 and 532 outlined three types of implied terms viz:

(1) where the court infers from evidence that the parties to a contract must have intended to include it in the contract though it has not been expressly set out therein;

(2) by operation of law, from ratios decidendi adopted by courts in subsequent cases on similar facts as a matter of course without the necessity for any court to decide afresh whether to draw the inference e.g. in a contract of employment, there is an implied term that an employee will serve his employer faithfully, and not to act against the employer's interest; and that the employer will provide a safe system of work. Many of such decisions on specific implied terms have been incorporated into statutes such as the Sale of Goods Act 1957 and others; and

(3) by custom or usage of any market or trade which is reasonable, e.g. under s 92(e) of the Evidence Act 1950.

[18] For the first type of implied term, his Lordship explained that there are two tests to fix the parties with an intention to include an implied term in the contract. These two tests are:

(1) the subjective test, 'something so obvious that it goes without saying so that, if, while the parties were making their bargain, an officious bystander were to suggest some express provision for it in the agreement, they would testily suppress him with a common 'Oh of course": per Mackinnon LJ in *Shirlaw v Southern Foundries* [1928] Ltd [1939] 2 KB 206 at 227 (see also *Reigate v Union Manufacturing Co (Ramsbottom) Ltd* [1918] 1 KB 592 at 605 per Scrutton LJ; and

(2) the implied term should be of the kind that will give business efficacy to the transaction of the contract of both parties and 'can be predicated that It goes without saying', some term not expressed but necessary to give the transaction such business efficacy as the parties must have intended' per Lord Wright in *Luxor (Eatborne) v Cooper* [1941] AC 108.

[19] Peh Swee Chin FCJ also stressed that both tests must be satisfied before a court infers an implied term, and referred to the speech of Lord Wilberforce in

Liverpool City Council v Irwin & Anor [1977] AC 239 to the effect that an implied term is a matter of necessity, so that the element of 'business efficacy is inseparable', and reaffirmed the views of Lord Simon of Glaisdale in *BP Refinery (Westernport) Pty Ltd v Hastings Shire Council* [1977] 16 ALR 363; and Chong Siew Fai J (later CJ (Sabah & Sarawak) in *Yap Nyo Nyok v Bath Pharmacy Sdn Bhd* [1993] 2 MLJ 250 where the same sentiment was expressed.

[20] His Lordship explained that in *Shirlaw*, Shirlaw was pursuant to an agreement appointed the managing director by the defendant for ten years. There was an implied term that the defendant would not alter its articles of association to create a right for itself to remove Shirlaw before the ten-year term expired, and that the post of managing director would continue to be available to Shirlaw for ten years as both parties must have intended it at the time when making the agreement, to give it business efficacy i.e. the desired result of the business in question.

[21] Having examined the law in relation to the admissibility of an implied term into a contract, I shall now revert to the mainstream of the factual background and consider the arbitrator's award of professional fees based on cost estimate No. 4.

PROFESSIONAL FEES AND COST ESTIMATE NO. 4

[22] It was submitted by Dato DP Naban of counsel for the State Government that:

(1) in awarding professional fees based on cost estimate No. 4, the arbitrator has inferred an implied term to the contract and misconstrued cl 1(c) of the schedule of fees ('cl 1(c)') and cl 11(2) of the conditions of engagement ('cl 11(2)') and on the authority of *Intelek Timur Sdn Bhd v Future Heritage Sdn Bhd* [2004] 1 MLJ 401, this award ought to be set aside; and

(2) the consulting architect was obliged to design and conduct its works under the contract in accordance with the allocated budget of RM130m.

[23] The consulting architect's learned counsel Mr William JK Leong, assisted by Miss Evelina Appaduray, submitted that:

(1) the arbitrator has not misinterpreted cl 1(c), as the term has been implied to serve the commercial purpose of the contract, citing *Manned Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749 at 771, HL; and

(2) the award is consistent with the custom and practice of the architectural profession, referring to *Datin Peggy Taylor v Udachin Development Sdn Bhd* [1984] 1 MLJ 85.

[24] The arbitrator's award dealing with this issue merits reproduction as follows:

6.07	Acceptance of latest estimate of costs by the Government not to be unreasonably withheld

6.07.1	As regards the 'acceptance by the Government' referred to in Clause 1(c) of the Schedule of Fees, acceptance of the Anggaran Permulaan No. 4 by the Respondent, as is also in respect of the Respondent's acceptances of the three (3) Nos. earlier Anggaran Permulaans, is not to be unreasonably withheld even if the cost estimates exceed the Respondent's expectations if there is no impropriety on the part of the parties responsible for the preparation of the cost estimates.
6.07.2	There is no allegation or suggestion of anything improper concerning Anggaran Permulaan No. 4 or any of the earlier Anggaran Permulaans.
6.07.3	There is no proof of the Respondent's rejection of the Anggaran Permulaan No. 4 at all from the time of their receipt of Anggaran Permulaan No. 4 to the time of termination of the Claimant's services. There is no indication at all of the Respondent rejecting any of the four Anggaran Permulaans which were prepared to keep the Respondent informed of the estimated construction and development costs.
6.07.4	By default the Respondent had accepted Anggaran Permulaan No. 4 which for all intents and purposes is a professional statement of the estimated construction costs of the Project prepared to up-date by the Respondent of the estimated costs of the Project which had been, by December 1995 and on their instructions, developed to stage of compilation of the Tender Drawings and the Tender Table Documents for tenders to be called and received, by either the Claimant on the Respondent's behalf or by the Respondent's authorised agent directly.
6.08	Respondent's decision to base fees on RM123m not in accordance with Clause 1(c) of Schedule of Fees

6.08.1	The respondent's decision to calculate fees payable to the claimant on the 'cost of works' in the sum of RM123m (vide 5 August 1996 letter from Jabatan Kewangan Dan Perbendaharaan Negeri to the Claimant) is in the light of Anggaran Permulaan No. 4 having been prepared in November 1995 and provided to the Respondent's authorised agent, not in accordance with Clause 1(c) of the Schedule of Fees in the Agreement which stipulated that the cost of works, for works where tenders have not been received, shall be the latest estimate of costs prepared by the Consulting Architect and accepted by the Government'.
6.08.2	The estimated construction cost of works under Phase 1 of the Project, in the sum of RM122,410,350.00 (sum inclusive of the provision of RM3,656,350.00 for Preliminaries) or the sum of RM123 million are both inapplicable under Clause 1(c) of the Schedule of Fees as the basis to calculate fees payable to the Claimant. This is in view of the fact that a more pertinent Anggaran Permulaan No. 4 had been prepared in November 1995, i.e. more than 18 months after the preparation of Anggaran Permulaan No. 3. Upon the preparation of Anggaran Permulaan No. 4, all three (3) Nos preceeding Anggaran Permulaans, are deemed to have been superseded by Anggaran Permulaan No. 4.

[25] The arbitrator has construed cl 1(c) by stating in essence that in the absence of any impropriety on the part of the consulting architect, acceptance of cost estimate No. 4 by the State Government was not to be unreasonably withheld even if the cost estimates exceeded the State Government's expectations, and that there was no allegation or suggestion of such impropriety. He stressed that there was no proof of the State Government's rejection of cost estimate No. 4 from the time of the State Government receiving cost estimate No. 4 (in December 1995) to the time of terminating the consulting architect's services (on 15 May 1996), and that the State Government has by default accepted it, thereby rendering the State Government's calculation of fees based on the sum of RM123m not in accordance with cl 1(c).

[26] In my view, the award of professional fees based on cost estimate No. 4 may be resolved by a true construction of the relevant portion of cl 11(2) and cl 1(c).

[27] Clause 11 sets out the types of services and payment in the following words:

> Cl 11 sets out the types of services and payment in the following words:
>
> (2) For the purpose of determining the payment to the Consulting Architect.... following the termination or suspension by the Government of the Project in which it is necessary to assess the payment to be made by reference to the cost of the works, then to the extent that such cost is not known, the assessment shall be made upon the basis of the Consulting Architect's best estimate of cost to be agreed to by the Government. [emphasis added].

[28] Where relevant, cl 1(c) provides for the method of arriving at the 'cost of works' as follows:

> The cost of works for the purpose of calculating the percentage fees shall be arrived at as follows:
>
> (a) …
>
> (b) …
>
> (c) for works where tenders have not been received, the latest estimate of costs prepared by the Consulting Architect and accepted by the Government' [emphasis added]

[29] Apparently, the arbitrator has focused on the construction of cl 1(c) without any reference to cl 11(2).

[30] The arbitrator appears to have construed cl 1(c) by implying a term into the contract i.e. the acceptance by the Government is not to be unreasonably withheld if there is no impropriety on the part of the consulting architect, and there was the State Government's acceptance by default.

[31] It is clear to me that the consulting architect had relied on the first type of implied term, i.e. where the court infers from the evidence that the parties to a contract must have intended to include it in the contract although it has not been expressly set out therein. However, there was no submission that on the evidence the two tests had been fulfilled.

[32] Upon a proper reading of the speeches of the law lords in Mannai Ltd, cited for the consulting architect, I find that the decision of the House of Lords does not concern the admission of an implied term into a contract. Hence, I am unable to see its usefulness to the consulting architect.

[33] Datin Peggy Taylor, also relied on by the consulting architect, concerns the suit by the personal representative of the architect for the sum of RM687,500 for professional services rendered by the architect in respect of a proposed multi-storeyed commercial and residential complex, on the ground that there had been abandonment of the project by Udachin or on the basis of quantum meruit. There was no law providing for the architects' scale of fees, but the Institute of Architects, a voluntary organisation, did provide certain guidelines called 'Conditions of Engagement and Scale of Professional Charges' (P50). However, a practising

architect is not obliged to charge the scale fees under P50, and could have agreed that his fees be paid on a lower scale as stipulated in the terms of the architect's letter of engagement (P14) there. The court had to consider whether or not P50 providing for the calculation of fees in the event of abandonment or for quantum meruit could be imported on PI4. Vohrah J (as he then was) gave the answer in the affirmative as P50 reflected the custom or practice of the architectural profession. The architect was paid on the basis of quantum merit.

[34] In my view, the facts in Datin Peggy Taylor, are readily distinguishable from those before me. The contract before me contains clauses which had been expressed in clear and unambiguous terms which should be given their ordinary and natural meaning. The professional fees which the consulting architect may claim are expressly stated in cl 11(2) and cl 1(c) i.e. the estimate cost must not only be agreed to by the State Government under cl 11(2), but also accepted by the State Government under cl 1(c). In other words, cost estimate No. 4 prepared by the consulting architect must fulfil these two preconditions or prerequisites. In the face of these clear and unambiguous words, there can be no room or necessity for the arbitrator to infer an implied term into the contract. With respect, the arbitrator has misconstrued cl 1(c).

TOWN PLANNING SERVICES

[35] It was submitted for the State Government that the arbitrator in awarding the sum of RM141,750 to the consulting architect for town planning services has misconstrued cl 5(5) of the conditions of engagement ('cl 5(5)'); and clauses 8 and 13 of the schedule of fees ('cl 8' and 'cl 13' respectively), as the written consent of the State Government was required for this type of special services.

[36] The consulting architect relied on the terms of reference and submitted that the consulting architect has carried out town planning services without the need to obtain the State Government's written consent.

[37] In para 6.13 of his award, the arbitrator sustained the consulting architect's submission and held that the State Government was liable to pay for the services of planning and laying out the overall plan for the project.

[38] In my judgment, it is to be noted that the parties before me do not dispute that special services include town planning services under cl 7(e). The parties' rights and obligations herein are expressly set out in cl 5(5), cl 8 and cl 13 which merit reproduction as follows:

> 5. Oligations of the consulting architect.
>
> (1) …
>
> (2) …
>
> (3) …
>
> (4) …
>
> (5) The Consulting Architect shall obtain the written consent of the Government before commencing his... special services as specified herein.(emphasis added)

8. Payment for special services.

(1) …

(2) Where the Consulting Architect is engaged to render the special services described in para … 7(e) the Consulting Architect shall be paid fees to be agreed upon by the Government and the Consulting Architect. (emphasis added)

13. Mode and time of payment for special services.

The Consulting Architect shall be paid for the special services rendered at intervals to be agreed upon between the Government and the Consulting Architect at the time the Consuslting Architect is first engaged. (emphasis added)

[39] The terms of reference which the consulting architect has relied on exclusively must not be read in isolation. It has to be construed conjunctively with the relevant clauses in the conditions of engagement and the schedule of fees, which are binding on the parties herein. The clear and unambiguous provisions of cl 5(5) must not be disregarded as there can be no doubt that in discharging the responsibility under the terms of reference, it is incumbent on the consulting architect to obtain the written consent of the State Government as a sine qua non. The fees to be paid have to be agreed by both the parties pursuant to cl 8 and cl 13, read with cl 7(e). In the absence of any written consent obtained from the State Government, the State Government's liability to pay would not arise under cl 8 and cl 13. With respect, by referring to the terms of reference without taking into consideration the clear and unambiguous terms of cl 5(5), cl 8 and cl 13,the arbitrator has omitted to construe these essential clauses.

REIMBURSABLE EXPENSES

[40] The State Government contended that although the consulting architect had not provided the basis of the claim for the sum of RM16,061.70 as reimbursable expenses, the arbitrator had nevertheless made such an award, as a result of which he had acted in excess of his jurisdiction.

[41] The consulting architect relied on cl 10 of the schedule of fees ('cl 10') for reimbursement of all expenses stated therein.

[42] The arbitrator allowed this claim on the ground that 'a project of this nature, scale and duration would invariably incur substantial reimbursable costs in its administration'.

[43] In my view, reimbursable expenses are regulated by cl 10 which where relevant reads:

10. Reimbursble Expenses

In addition to the fees payable to the Consulting Architect for any of the services rendered, the Consulting Architect shall for the purposes of the Project be entitled to be reimbursed for the following:

(a) except for one set of all documents to be provided free of charge to the Government at all phases of the Project, all other printing, reproduction or cost of all documents, drawings, maps, models, photos and other records including all those used in communication between the Consulting Architect and all other consultants and contractors and for the costs of all enquiries to contractors, sub-contractors and suppliers as expended;

(b) hotel and travelling expenses based on the current Government rates not exceeding that of a Government Super scale 'G' officer entitlement;

(c) expenses incurred in connection with advertisement of tender notices, resident site or other staff required for the Project and other payments made on behalf of the Government;

(d) telegrams, telexes, outstation telephone calls, postage charges for sending documents or other items at the request of the Government; and

(e) where other consultants are engaged directly by the Consulting Architect with the prior approval of the Government, the fees payable to the other consultants.

[44] Upon a true construction of cl 10, I am of the view that while there can be no doubt that the consulting architect is entitled to be reimbursed for expenses stated in paragraphs (a) to (e) of cl 10, these reimbursements ought to be itemised and supported by some documents such as bills, payment vouchers or the like so that the expenses could be verified and the claim allowed. In ordinary parlance, reimbursable expenses are in reality out-of-pocket expenses which require documentary support.

[45] Upon a careful and proper perusal of the arbitrator's award, I am unable to find the necessary particulars for the purpose of verifying the reimbursable expenses. With respect, I find that there is therefore a misconstruction of cl 10.

TAXED COSTS

[46] The State Government complained that the arbitrator did not hear evidence or submissions on the issue of costs which the arbitrator had purportedly taxed and awarded the sum of RM118,794.66.

[47] The response of the consulting architect is that the arbitrator's award of this item was for his costs as an arbitrator and the costs charged by the Board of Architects to which the parties had referred the proceedings, adding that the arbitrator has full discretion in awarding such costs under s 19(1) of the Arbitration Act 1952 (' s 19(1)').

[48] In this regard, para 7.06 of the arbitrator's award reads:

> … the costs of this Award which I tax and settle in the sum of RM118,794.66.

[49] In my view, the arbitrator appears to have taxed the costs but he has not set out the procedure or method which he had adopted in order to arrive at the said

amount. By way of elaboration, I am unable to say that the parties were given the chance of being heard or making submissions before the arbitrator awarded the taxed costs.

[50] Section 19(1) which was the governing law in 2005, before the Arbitration Act 2005 came into force on 15 March 2006, merits reproduction as follows:

> 19. Costs
>
> Unless a contrary intention is expressed therein, every arbitration agreement shall be deemed to include a provision that the costs of the reference and award shall be in the discretion of the arbitrator or umpire who may direct to and by whom and in what manner those costs or any part thereof shall be paid, and may tax or settle the amount of costs to be so paid or any part thereof, and may award costs to be paid as between solicitor and client.

[51] Clause 4 of the contract which provides for the settlement of disputes between the parties herein by way of arbitration does not express any intention in relation to costs. Hence, under s 19(1), the arbitrator has a full discretion in the matter of costs. It is to be observed that such discretion is only to be exercised by having regard to the facts and circumstances of each particular case and according to established judicial principles, eg:

(1) by applying the same principles as would the High Court in like circumstances: per Edgar Joseph Jr SCJ (as he then was) in *Teong Piling Co v Asia Insurance Co Ltd* [1994] 1 MLJ 444 at 448;

(2) the principles of natural justice; and

(3) costs follow the event, which means that the successful party should have his costs.

[52] In the High Court, costs could either be agreed to by the parties or taxed, in which case, both parties are entitled to be heard before any taxed costs can be awarded.

[53] There are many types of costs; the two most common ones are costs awarded on a party to party basis; and solicitors-client basis. The arbitrator has not indicated the basis which he has applied. He has not proffered any reason for arriving at the taxed costs. With respect, I am unable to say that he has embarked upon a proper exercise of judicial discretion under s 19(1). In the absence of a proper exercise of discretion, the taxed costs that he has awarded is legally unsustainable.

POWER TO SET ASIDE

[54] Generally, an arbitrator's award is final, binding and conclusive, and may only be challenged in exceptional circumstances. Under s 24(2) of the Arbitration Act 1952, the High Court could and should exercise the power to set aside e.g. where there is an error in construction; it was apparent on the face of the record and could

not be countenanced by the court: *Halsbury Laws of England (4th Ed)* para 623, as applied by the Federal Court through the judgment of Siti Norma Yaakob FCJ (later CJ (M)) in *Intelek Timur Sdn Bhd* at pp 750 and 751.

CONCLUSION

[55] On the foregoing grounds, I allow this originating motion in part and make the following orders:

(1) The award of the additional sum of RM1,713,768.73 for professional fees based on cost estimate No. 4 is hereby set aside, and substituted with an award for professional fees (less all sums paid to date by the State Government to the consulting architect) based on the allocated budget of RM130m as agreed and accepted by the State Government, with interest at 8% p.a. from the date of the arbitrator's award on 5 July 2005 to the date of realisation; and

(2) The award for professional fees for town planning services; the award for reimbursable expenses and arbitration costs are hereby set aside.

[56] In the light of the above orders, whereby both parties are successful in part only, the positions of the parties herein and before the arbitrator are now placed in equilibrium. Since costs follow the event, I order the parties herein to bear their own costs, both here and before the arbitrator.

Originating motion allowed.

Reported by Kenny Wong